IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1333 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MOHANBHAI BHALUBHAI GOHIL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1333 of 1993

MS BANNA S DUTTA for Petitioner No. 1

THROUGH JAIL for Petitioner No. 1

MR DP JOSHI, APP for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 07/11/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. By filing this appeal u/S. 374 (2) of the Code of Criminal Procedure, 1973, the appellant has challenged legality of judgment dated November 30, 1993 rendered by the Ld. Addl. City Sessions Judge, Court No. 3, Ahmedabad in Sessions Case No. 350/1992 by which he is convicted of the offence punishable u/S. 302 of the Indian Penal Code and punished with imprisonment for life.

2. Deceased Gomiben, daughter of Pitamber Devrajbhai was married to the appellant. After the marriage she was staying with the appellant at Gandhinagar Tekra, Juna Vadaj, Ahmedabad. The incident in question took place on August 8, 1992. Eight months prior to the date of incident the appellant had purchased a rickshaw from the maternal uncle of deceased Gomiben, for which the appellant had paid a sum of Rs.9,000/- and rest of the amount agreed to be paid was to be paid in monthly instalments. However, eight days after the purchase of rickshaw, the maternal uncle of the deceased had taken away the rickshaw back from the appellant without returning the amount of Rs.9,000/- paid by the appellant. The appellant had, therefore, asked the deceased to go to village Badutara, Taluka Santalpur where her maternal uncle was staying and to recover Rs.9,000/- paid by the appellant. The deceased had accordingly gone to village Badutara, but found that her maternal uncle had gone to Rajasthan and, therefore, she had to return home without money. When the appellant had come home, he had asked the deceased about money and though the deceased had pointed out that she could not bring the money as her maternal uncle had gone to Rajasthan, the appellant had started quarreling with her on this issue. At about 7.00 p.m. when she was sleeping in the house, the appellant had come from behind and after pouring kerosene on her had set her ablaze. The deceased had shouted for help, but as no one else was present in the house, none had come to her rescue and when she was trying to run out of the house, her brother Shankar had suddenly come and wrapped her with a towel and saved her from being burnt further. The deceased had sustained severe burn injuries, whereas the appellant had run away from the place of incident immediately. Within a short time, father of the deceased had come home and removed her to Civil Hospital in a rickshaw. At Civil Hospital her complaint was recorded by Mr. N.C. Oza, who was then P.S.I. of Sardarnagar Police Station. The P.S.I. had also made arrangement for recording dying declaration of the deceased and accordingly the dying declaration of the deceased was recorded by the Executive Magistrate. During the course of treatment the deceased succumbed to

her injuries at the hospital on August 12, 1992. Therefore, the Investigating Officer held inquest panchnama on her dead body and on completion of investigation, the appellant was chargesheeted of the offence punishable u/S. 302 of the Indian Penal Code in the Court of the Ld. Metropolitan Magistrate.

3. As the offence punishable u/S. 302 of the Indian Penal Code is exclusively triable by a Court of Sessions, the case was committed to City Sessions Court, Ahmedabad, where it was numbered as Sessions Case No. 350/1992.

4. The charge at Exh. 1 was framed against the appellant of the offence punishable u/S. 302 of the Indian Penal Code. The charge was read over and explained to the appellant, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Shankarbhai Pitamberbhai Ghavad P.W.1 Exh. 6, (2) Pitamberbhai Devrajbhai P.W. 2 Exh. 7, (3) Vinayakrao Vasudevrao Patil P.W.3 Exh. 20, (4) Laxmanji Malaji Thakore P.W.4 Exh. 21, (5) Udesing Karsanbhai Vaghela P.W.5 Exh. 23, (6) Jimiben Galabhai Ghavad P.W.6 Exh. 27, (7) Natvarlal Chhaganlal Oza, P.W.7 Exh. 28 and (8) Dr. Rameshchandra Bhagubhai Shah P.W.8 Exh. 30 to prove its case against the appellant. The prosecution also produced documentary evidence such as complaint of the deceased recorded by Mr. Oza which was treated as dying declaration at Exh. 29, dying declaration of the deceased recorded by Executive Magistrate at Exh. 25, report of the Forensic Science Laboratory, etc. in support of its case against the appellant. After recording of evidence of prosecution witnesses was over, the Ld. Judge explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement the appellant denied the case of the prosecution, but did not lead any evidence in his defence.

5. On appreciation of evidence led by the prosecution the Ld. Judge held that the evidence of Investigating Officer Mr. N.C. Oza and that of Executive Magistrate Mr. U.K. Vaghela was reliable, consistent and cogent. The Ld. Judge after placing reliance on their evidence deduced that it was proved by the prosecution beyond reasonable doubt that the deceased while in a fit state of mind had made dying declaration implicating the appellant as the person who had set her on fire. The Ld. Judge also referred to the evidence of witness Shankarbhai Ghavad as well as that of

Pitamberbhai Devrajbhai and held that their evidence which was cogent, trustworthy and reliable proved beyond pale of doubt that the deceased had made oral dying declarations before them implicating the appellant as the person who had caused burn injuries to her. The Ld. Judge also referred to the evidence of Dr. Rameshchandra Shah P.W.8 Exh. 30 and noticed that his evidence as well as history of assault noted by him also proves beyond shadow of doubt that the appellant had poured kerosene on the deceased and had thereafter set her ablaze. Further the Ld. Judge referred to the evidence of Forensic Science Laboratory and held that the shirt and trousers put on by the appellant seized during the course of investigation had petroleum hydro carbons (kerosene residue) and that was an incriminating circumstance against the appellant. In view of the above referred to conclusions the Ld. Judge has convicted the appellant of the offence punishable u/S. 302 of the Indian Penal Code and imposed punishment, which is referred to earlier by judgment dated November 30, 1993, giving rise to the present appeal.

6. Ms. Banna Datta, learned counsel for the appellant after taking us through the entire evidence on record submitted that the evidence on record does not indicate that the deceased was in a position to identify the appellant as her assailant and, therefore, benefit of doubt deserves to be granted to the appellant. What was claimed was that the version narrated by the deceased in her two dying declarations is intrinsically not sound nor accords with probabilities and, therefore, the appeal should be accepted. The learned counsel emphasized that in view of the serious injuries sustained by the deceased she must have been rendered speechless immediately and as the evidence regarding dying declarations is not trustworthy, the judgment impugned in the appeal should be reversed. It was stressed that the evidence led by the prosecution regarding oral dying declaration made by the deceased consists of interested witnesses and, therefore, the Ld. Judge should not have relied upon the same for the purpose of convicting the appellant u/S. 302 of the Indian Penal Code. Lastly it was urged that the prosecution has failed to prove its case against the appellant beyond reasonable doubt and, therefore, the appeal should be allowed.

7. Mr. D.P. JOshi, Ld. APP for the State submitted that the evidence on record establishes that the victim was in a position to identify the appellant as her assailant and, therefore, it cannot be said that any error was committed by the Ld. Judge in placing reliance

on the dying declarations which are satisfactorily proved by the prosecution witnesses. What was pleaded was that the version narrated by the deceased is intrinsically sound and accords with probabilities and, therefore, the well reasoned judgment of the trial Court should be upheld. According to the Ld. APP, the defence has not been able to point out that material part of any of the dying declarations is proved to be false by other reliable evidence and, therefore, the appeal should not be accepted.

8. We have taken into consideration the submissions advanced at the bar and reappreciated the whole evidence on record.

9. The finding recorded by the Ld. Judge that the deceased had died a homicidal death is amply proved by the evidence of Dr. Rameshchandra Shah P.W.8 Exh.30. The doctor in his substantive evidence before the Court has stated that on August 8, 1992 deceased Gomiben was brought before him as she had sustained burn injuries and that on enquiry being made she had informed him that the appellant had poured kerosene on her and had set her ablaze at 7.00 p.m. as she could not bring Rs.9,000/from her maternal uncle. The doctor has further deposed that the deceased had succumbed to her injuries on August 12, 1992 and that during the course of treatment he had found that the deceased had sustained 1st, 2nd and 3rd degree burns. The doctor has also mentioned in his deposition that all the injuries which were noticed by him were noted by him in medical case papers relating to the deceased and he has produced those papers at Exh. 32. Further the evidence of Dr. Vinayakrao V. Patil P.W. 3 Exh. 20 establishes that the dead body of the deceased was brought before him on August 12, 1992 for post mortem examination and that he had conducted post mortem examination on the dead body of the deceased. The doctor has stated that he had noticed the injuries during the course of post mortem examination which are mentioned in detail in the post mortem notes prepared by him and produced on the record of the case at Exh.17. We may state that post mortem notes of the deceased have been exhibited in the case with consent of the parties. According to Dr. Patil the cause of death of the deceased was shock due to burns and its complications. The injuries which were sustained by the deceased are also narrated by witness Shankarbhai Ghavad, who is her brother as well as witness Pitambarbhai, who is her father. The injuries are also mentioned in detail in inquest panchnama which is on record of the case at Exh. 13. Having regard to the nature of evidence led by the

prosecution, we are of the opinion that it is satisfactorily proved by the prosecution that the deceased had died a homicidal death. The said finding which is recorded by the Ld. Judge of the trial Court being eminently just, is hereby upheld.

10. In order to prove the case against the appellant the prosecution has heavily relied upon two dying declarations i.e. one recorded by witness N.C. Oza as complaint which is treated as dying declaration of the deceased after her death and the dying declaration recorded by Mr. U.K. Vaghela , Executive Magistrate. Before considering the evidence regarding dying declaration, it would be instructive to notice the law relating to the dying declaration. Section 32(1) of the Indian Evidence Act, 1872 is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not credit-worthy. Under Section 32 when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a person is most unlikely to make any untrue statement. The sanctity attached to dying declaration is that a person on the verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause of circumstances leading to his death. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the person is at the point of death and when every hope of this world is gone. At that point of time every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth, such a solemn situation is considered by the law as creating an obligation equal to that which as imposed by a positive oath administered in a court of justice. Dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying

person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Courts, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration by itself can be sufficient for recording conviction even without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance then the Courts have to look for corroboration. The rule of corroboration requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. It is also well settled that it is not necessary that recording of dying declaration should be in the form of question and answer. The persons making dying declaration need not make elaborate and exhaustive statement as to cover each and every aspect of the incident, more so, where the deceased-declarant was, at that time, suffering from high degree or burns and was under severe stress and agony. The Supreme Court has emphasized that shortness of the statement itself guarantees truth. One of the important tests of reliability of dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been advised in judicial pronouncement in order to answer the question whether the dying declaration is true:

(1) Was the victim in a position to identify the assailant/s ?
(2) Whether the version narrated by the victim is intrinsically sound and accords with probabilities ?
(3) Whether any material part is proved to be false by other reliable evidence ?

(See: (1) Khushall Rao v. State of Bombay (1958) SCR 552; (2) Tarachand Damu Sutar v. State of Maharashtra (1962) 2 SCR 775: (3) Kusa and ors. v. State of Orissa, (1980) 2 SCC 207; (4) Meesala Kundula Bata Subrahmaniyam and another v. State of A.P., (1993) 2 SCC 684; (5) Meesala Ramkrishna v. State of A.P. (1994) 4 SCC 181; (6) Govardhan Raoji Ghyare v. State of Maharashtra, 1993 Suppl. 4 SCC 316; (7) Gangotri Singh v. State of U.P. 1993 Suppl. 1 SCC 387; (8) Smt.

Paniben v. State of Gujarat, A.I.R. 1992 S.C. 1817; (9) State of Rajasthan v. Kishore, JT 1996 (2) SC 595; and (10) State of U.P. v. Ameer Ali, JT 1996 (4) S.C. 123.)

11. In the light of the above principles, we will now consider the dying declarations which are sought to be relied upon by the prosecution to prove its case against the appellant. Witness Natvarbhai Chhaganbhai Oza P.W.7 Exh.28 has stated in his evidence that on August 8, 1992 he was discharging duties as P.S.I. of Sardarnagar Police Station and on receiving Wardhy from hospital to the effect that Bai Gomiben was admitted in the hospital with burn injuries, he had gone to the hospital and recorded her complaint as narrated by her. The witness has stated that the deceased in her complaint had stated amongst other things that her maternal uncle had taken away rickshaw from her husband and that though she had gone to the place of her maternal uncle for bringing Rs.9,000/-, she could not bring the said amount and, therefore, the appellant had quarreled with her and after pouring kerosene over her, had set her ablaze. The Police Officer has further deposed that before recording the complaint he had ascertained from the doctor as to whether the deceased was conscious or not and after the doctor had certified that the deceased was conscious, he had recorded the complaint of the deceased. Though in his cross-examination the witness has admitted that he had not obtained any endorsement on the complaint of the deceased from the doctor to the effect that the deceased was conscious, the witness has denied the suggestion made by the defence that the deceased was not in a fit state of mind to make any statement to him. The witness has also denied the suggestion that he had written down in the complaint what was stated to him by the father of the deceased. The evidence of Police Officer Mr. Oza stands corroborated by the contents of the complaint which is on record of the case at Exh. 29. Further Dr. Rameshchandra Shah P.W.8 Exh.30 in his substantive evidence before the Court has stated that at about 8.15 p.m. on August 8, 1992 the deceased was brought to the hospital for burn treatment and that he had given particulars about the incident to the head constable on duty after ascertaining history of assault from the deceased. The evidence of doctor stands corroborated by the medical papers on record and more particularly Exh. 32 wherein history given by the deceased herself is noted. The said entry also establishes that the deceased had stated before the doctor that the appellant had set her ablaze after pouring kerosene over her as she could not bring Rs.9,000/- from her maternal uncle. In the

light of the evidence of Dr. Rameshchandra Shah, the assertion made by Investigating Officer Mr. Oza that the deceased was conscious and, therefore, he had recorded her complaint as narrated by her deserves to be accepted. A bare reading of the contents of the complaint makes it manifest that the Police Officer could not have imagined the facts which are stated in the complaint. The evidence on record does not establish that when the complaint of the deceased was recorded, either her brother or her father were present. On overall view of the matter, we are satisfied that the Police Officer had recorded the complaint as narrated by the deceased and the same is a reliable piece of evidence. It is well settled that on the death of the victim the complaint given will have to be treated as her dying declaration. A bare reading of the complaint makes it evident that the appellant had set the deceased on fire as she could not bring Rs.9,000/back from her maternal uncle. Therefore, the complaint which is to be treated as dying declaration establishes beyond reasonable doubt that the appellant had caused death of the deceased by setting her on fire after pouring kerosene over her.

12. The second dying declaration is proved through the evidence of witness Udesing Karsanbhai Vaghela P.W.5 Exh.23. The evidence of Mr. Vaghela indicates that at the relevant time he was discharging duties as Executive Magistrate of Metropolitan area and that he had received necessary Yadi from Investigating Officer for recording dying declaration of the deceased. The witness has stated before the Court that he had accordingly gone to the Civil Hospital in a police van and after ascertaining that the deceased was physically and mentally fit to make a statement, had recorded her dying declaration as narrated by her. The witness has asserted before the Court that he had asked the relatives of the deceased to go out of the room before recording the dying declaration of the deceased. What is mentioned by this witness is that he had asked questions to the deceased in Gujarati language and that the deceased was giving replies to those questions in Gujarati language and that he had noted down the answers given by the deceased. The Executive Magistrate has produced the dying declaration recorded by him on the record of the case at Exh. 25. In cross-examination the witness has stated that he had not thought it fit to record dying declaration of the deceased in presence of the doctor. In his cross-examination the witness has denied the suggestion made by the defence that he had obtained right hand thumb impression of the deceased because the deceased was physically and mentally not in a fit state to make a

statement. On reappreciation of evidence of the Executive Magistrate, we are satisfied that dying declaration of the deceased was recorded by witness Vaghela and the dying declaration which is on record of the case at Exh. 25 also proves beyond reasonable doubt that the appellant had set the deceased on fire after pouring kerosene over her as she could not bring back Rs.9,000/- from her maternal uncle. The evidence led by the prosecution regarding two dying declarations is consistent, reliable and cogent. There is no manner of doubt that the deceased was in a position to identify the appellant as her assailant. The version narrated by the deceased is intrinsically sound and accords with probabilities. No material part of the dying declaration is proved to be false by the other reliable evidence on record. Under the circumstances, there is no reason to disbelieve the two dying declarations which are proved by the prosecution satisfactorily.

13. Further the evidence of witness Shankarbhai and witness Pitambarbhai would indicate that the deceased had made oral dying declarations before them implicating the appellant as the person who had set her ablaze after pouring kerosene over her. We may state that the evidence regarding oral dying declaration tendered by these witnesses is not controverted by the appellant during the course of cross-examination of the witnesses. Where the evidence of a witness is allowed to go unchallenged with regard to a particular point, it may safely be accepted as true. Under the circumstances, we are of the opinion that the Ld. Judge of the trial Court who had advantage of observing demeanor of the witnesses did not commit any error in placing reliance on the evidence of witness Shankarbhai and witness Pitambarbhai for the purpose of holding that it was proved by the prosecution beyond pale of doubt that deceased had made oral dying declarations implicating the appellant as the person who had caused burn injuries to her.

14. Further the report of the Forensic Science Laboratory indicates that from the shirt and trousers which were put on by the appellant petroleum hydro carbon (kerosene residue) was found which is quite consistent with the story narrated by the deceased in her two dying declarations as well as two oral dying declarations.

15. On overall view of the matter, we are satisfied that cogent and convincing reasons have been given by the Ld. Judge for convicting the appellant for the offence punishable u/S. 302 of the Indian Penal Code. On reappreciation of the evidence, we do not find that any

error is committed by the Ld. Judge either in appreciating the evidence adduced by the prosecution or in applying principles of law to the proved facts and, therefore, the appeal is liable to be dismissed.

16. For the foregoing reasons, the appeal fails and is dismissed.

Muddamal articles to be disposed of in terms of directions given by the Ld. Judge in the impugned judgment.

[J .M. PANCHAL, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.